



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 16399/2023

In the application between

**MERCHANT COMMERCIAL FINANCE 1
(PTY) LTD TRADING AS MERCHANT FACTORS
(REGISTRATION NUMBER: 2014/075671/07)**

APPLICANT

And

VALOWORX 33 CCFIRST RESPONDENT

ARCHAR COLYER HEAD N.O.

SECOND RESPONDENT

ARCHAR ALEXANDER BROWNLEE N.O.

THIRD RESPONDENT

**ANDREW GRANT KIRKMAN N.O.
ACTING IN THEIR CAPACITIES AS THE
JOINT TRUSTEES OF THE CAPE LEOPARD
TRUST (IT 1382/2002)**

FOURTH RESPONDENT

ARCHAR COLYER HEAD

FIFTH RESPONDENT

Date of hearing: 7 November 2024

Date of judgment: The judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 19 November 2024

JUDGMENT

VAN DEN BERG, AJ

- [1] This is an opposed application for a monetary order against the first respondent, as principal debtor, and the remaining respondents as sureties (the second to fourth respondents are cited *nomino officio* as the trustees for the time being of the Cape Leopard Trust).
- [2] The current application arises from litigation that commenced as long ago as 12 July 2022 in an application between the same parties. The application, as mentioned, culminated in the dismissal of the respondents' application for leave to appeal by the Constitutional Court. It is, therefore, apt to succinctly set out the matter's contextual history.

THE CONTEXTUAL HISTORY

- [3] On 23 June 2016, the applicant and the first respondent entered into a written Term Loan Facility Agreement, in terms of which the applicant loaned and advanced an amount of R500,000.00 to the first respondent (*'the Term Loan Agreement'*).
- [4] From 15 June 2016 to 20 February 2018, the applicant and the first respondent concluded at least 4 (four) Memorandums of Agreement, constituting addendums to the Term Loan Agreement, in term whereof further amounts were loaned and advanced (*'the addendum agreements'*).

- [5] The first respondent defaulted on the obligations owed to the applicant in terms of the Term Loan Agreement and addendum agreements.
- [6] On 14 December 2020, the applicant and the first respondent, as principal debtor, concluded a written Settlement Agreement. The second to fourth respondents, in their capacities as the trustees for the time being of the Cape Leopard Trust, and the fifth respondent, in his personal capacity, provided the applicant and its predecessor with Deeds of Suretyship prior to and subsequent to the conclusion of the Term Loan Agreement. The second to fifth respondents, therefore, also signed the Settlement Agreement, admitting their indebtedness as co-principal debtors and sureties, along with the first respondent, to the applicant for repayment of the amount of R1,094,919.85, together with interest thereon at the rate of 3% per 30 days or part thereof, and legal fees on an attorney and client scale.
- [7] The applicant alleges that the first respondent defaulted in making the agreed payments in terms of the Settlement Agreement. Consequently, the applicant applied for and obtained, on an *ex parte* basis before the Honourable Mr Justice Dolamo on 12 July 2020, an order, *inter alia*, authorising it to take and retain possession of movable assets provided to the applicant as security in terms of a special notarial covering bond and a general notarial collateral bond.
- [8] The return date of the *ex parte* order was argued on an opposed basis before the Honourable Mr Justice Francis, who granted an order on 28 September 2023. The rule *nisi* was confirmed and made final. In opposing the confirmation of the rule *nisi*, the respondents contended that the Term Loan Agreement, addendum agreements, Settlement Agreement and Deeds of Suretyship are null and void due to the fact that the Term Loan Agreement fell within the ambit of the National Credit Act, 34 of 2005 and, because the applicant is not registered as a credit provider, the agreements are unenforceable (***“the NCA defence”***).

- [9] Francis J rejected the NCA defence. The respondents applied for leave to appeal; however, the application was denied on 28 September 2023.
- [10] The respondents subsequently applied for special leave to appeal against Justice Francis's judgment and order, which application was dismissed by the Supreme Court of Appeal on 23 November 2023.
- [11] The respondents then applied to the Constitutional Court for special leave to appeal against Justice Francis's judgment and order, which application was dismissed by the Constitutional Court on 27 August 2024. The respondents raised the same NCA defence in opposition to the monetary judgment applied for in this application. In light of the Constitutional Court's dismissal of the application for special leave, the issues regarding the NCA defence have become settled and the respondents rightfully no longer persist with the NCA defence as a ground of opposition.

COMMON CAUSE FACTS

- [12] In the context of the litigation history and the orders of Court granted, read together with the affidavits filed in this application, the following facts are common cause:
- [12.1] The conclusion of the term Loan Agreement, addendum agreements and Deeds of Suretyship.
- [12.2] The conclusion of the Settlement Agreement and its terms.
- [12.3] That the respondents breached the terms of the Term Loan Agreement and addendums and that the compromised amount payable at the date of the conclusion of the Settlement Agreement amounts to R1,094,919.65.
- [12.4] That the respondents made, in terms of the Settlement Agreement 3 (three) payments totalling R150,000.00.

[12.5] That the second to fifth respondents, in terms of the Settlement Agreement, undertook to repay the compromised amount by making a payment of R100,000.00 (One Hundred Thousand Rand) on or before 20 December 2020 and thereafter by means of monthly instalments of no less than R25,000.00 (Twenty Five Thousand Rand) commencing on 31 December 2020, until the full settlement of the capital, together with interest and charges.

[12.6] That the second to fourth respondents, on behalf of the Cape Leopard Trust, and the fifth respondent, in his personal capacity, concluded suretyship agreements in terms whereof they bound themselves jointly and severally as sureties, guarantors and co-principal debtors in solidum for the due and proper fulfilment of the first respondent's obligations (*the fifth respondent, however, denies that the suretyship was granted in favour of the applicant*).

[12.7] Lastly, it is common cause that the respondents agreed that a certificate signed by the director of the applicant would serve as *prima facie* proof of their indebtedness to the applicant.

THE RESPONDENTS' DEFENCES TO THE MONETARY CLAIM

[13] The respondents, in their answering affidavit, raised the same defences that were raised in the previous proceedings, which culminated in the Constitutional Court's dismissal of their application for special leave to appeal. These defences included the NCA defence referred to above. In addition, the respondents contend that the applicant's claim exceeds the *duplum* and accordingly falls foul of the *in duplum* rule. The applicant correctly conceded this point.

[14] The respondents also contended that the interest rate charged by the applicant is usurious and egregious. In addition, the fifth respondent further claimed that he granted the written suretyship in favour of a third party, the

applicant's predecessor in title, and that no case was made out in the applicant's founding affidavit to explain that the applicant is the successor in right and title of the third party to whom the suretyship was granted.

[15] Lastly, Mr Wilkin submitted, in *limine*, in the respondents' heads of argument, that the applicant's founding affidavit contains no evidence that the applicant authorised the institution of this application, and that this, in itself, should serve as a reason for the dismissal thereof.

[16] The rejection by the Supreme Court of Appeal and Constitutional Court of the NCA defence raised by the respondents means that this Court had to decide the following issues:

[16.1] Whether the application was authorised.

[16.2] Whether the fifth respondent is liable as co-principal debtor and surety.

[16.3] What the effect is of the applicant's concession regarding the *in duplum* rule and

[16.4] Whether the applicant proved the outstanding amount for which the monetary order is sought.

AUTHORISATION OF PROCEEDINGS

[17] Mr Wilken, on behalf of the respondents, relied upon the judgment by this Court in **Head and another v Morris N.O. and others**¹ where the Full Bench held that:

"It is plain from these provisions that Rule 7(1) does not deal with the decision to institute legal proceedings of the nature envisaged in casu, it

¹ Appeal (A91/2022) [2023] SAWCHC 343 (28 December 2023)

deals with the power of legal representatives to represent their clients. It allows any litigant to request such a power of attorney and bears no reference at all to the decision of the juristic person or the provisional trustees to institute proceedings.”

[18] According to the respondents, there is no evidence that the applicant's directors authorised the institution of this application.

[19] The deponent, on behalf of the applicant, states in paragraph 1 of the founding affidavit that he is duly authorised to depose to the affidavit and to apply for the relief set out in the application. This bold assertion was not disputed by the respondents in their answering affidavit. The parties have been actively engaged in litigation for more than two years. At no previous time did the respondents ever dispute the authorisation regarding the institution of any proceedings. The point *in limine* was, therefore, raised as an afterthought and cannot be upheld.

VALIDITY OF FIFTH RESPONDENT'S DEED OF SURETYSHIP

[20] It is common cause that the fifth respondent executed his suretyship in favour of the applicant's predecessor in title, Merchant Commercial Finance (Pty) Limited (Registration Number 1998/018914/07). In terms of clause 27 of the suretyship executed by the fifth respondent, the applicant's predecessor was entitled to cede the suretyship to the applicant at any time, without reference to the fifth respondent, who acknowledged that he would, upon such cession, be liable to the applicant in terms thereof. In the replying affidavit, the applicant states that the applicant entered into a sale of business agreement with its predecessor, in terms of which the applicant purchased its predecessor's business as a going concern, including all of its assets, liabilities, and securities, including the suretyship executed by the fifth respondent.

[21] As set out above, the fifth respondent furthermore concluded the Settlement Agreement in his personal capacity, as well as on behalf of the first

respondent and the trustees of the Cape Leopard Trust. In terms of the Settlement Agreement, the second to fifth respondents agreed that, should the first respondent default in effecting the agreed payment in terms thereof, the debtors would be liable to the applicant jointly and severally, the one paying the other to be absolved, for the settlement amount.

- [22] Accordingly, the fifth respondent remains liable jointly and severally with the other respondents in light of the provisions of his suretyship, read together with the Settlement Agreement.

***PRIMA FACIE* CERTIFICATE, IN DUPLUM AND CLAIMED AMOUNT**

- [23] In his heads of argument, the applicant's Counsel, Mr Newton, stated in paragraph 1 thereof that the applicant seeks a monetary judgment against the respondents for payment of an amount to be reflected on the applicant's updated certificate of balance, together with mora interest at the statutory rate from the date of order to date of final payment. No updated certificate of balance was filed or formed part of the affidavits. In this regard, Mr Newton, in his heads of argument and in arguing the application, submitted that the applicant concedes that the *in duplum* rule is applicable and requested to furnish the Court with an appropriate updated certificate of balance at the hearing of the matter.

- [24] I was informed from the Bar that the applicant indeed provided the respondents' Counsel with the updated certificate of balance and a calculation supporting it shortly before the commencement of the hearing.

- [25] The updated certificate of balance and schedule of payments were not handed up to the Court and I did not receive it.

- [26] The respondents rightly argued that, since the applicant concedes that the *in duplum* rule is applicable, the certificate of balance attached to the founding affidavit is erroneous. The respondents argued that, as a result, the applicant

has failed to provide *prima facie* proof, in accordance with the contractual terms between the parties, of the outstanding amount.

- [27] The second basis upon which the respondents contested the amount claimed was that the interest charged by the applicant was not calculated in accordance with paragraph 3 of the Term Loan Agreement. In paragraph 21 of the respondents' answering affidavit, the following is stated:

"The interest charged by Merchant was not as per paragraph 3 of the memorandum of agreement ... but was completely arbitrary."

- [28] In support of this argument, the respondents attached email correspondence exchanged between the parties dated 10 and 11 September 2020 to the answering affidavit. Based on this correspondence, the respondents contended that the applicant conceded that it did not calculate interest on a 30 day basis, but instead calculated interest during certain months based on a 28-day period, and a 35 day period for others. This is the high-water mark of the respondents' attack on the interest calculation.

- [29] Mr Wilken conceded that the respondents agreed to payment of 3% interest, calculated every 30 days or part thereof. The interest rate is not usurious since the parties freely negotiated the interest rate in the course of a commercial transaction.

- [30] However, the facts in this application should be distinguished from the normal procedure where an applicant or plaintiff would be allowed to introduce a fresh certificate of balance to provide for an updated interest calculation or payments received, after the close of pleadings, at the hearing of the matter. In this application, the calculation of the outstanding amount goes to the heart of the dispute between the parties.

- [31] I do not understand why the applicant did not, in light of its concession of the applicability of the *in duplum* rule, recalculate the outstanding amount and

attach a fresh certificate of balance to, at least, its replying affidavit or, at worst, the heads of argument.

- [32] Sensing the difficulty mentioned above, Mr Newton changed tact. He submitted that the Court does not need to rely upon the original certificate of balance or an updated certificate of balance to determine the outstanding amount for which the monetary judgment is sought.
- [33] Mr Newton submitted that the Settlement Agreement is the starting point of the enquiry into whether the applicant has proved the outstanding amount. The respondents admit their indebtedness to the applicant in the Settlement Agreement for payment of R1,094,919.65. In favour of the respondents, the applicant contends that 3 (three) payments were received in terms of the Settlement Agreement totalling R150,000.00. That leaves a capital balance due in terms of the Settlement Agreement (without any interest) of R944,919.85. If the aforesaid outstanding amount is multiplied by two in line with the *in duplum* rule, the outstanding amount comes to R1,889,839.70.
- [34] Mr Newton referred to the judgment by the Supreme Court of Appeal in **Standard Bank of South Africa Limited v Oneanate Investments (Pty) Ltd [in liquidation]**² in which it was held that interest stops running when it equals the unpaid capital. Since a judgment novates the original debt, interest can again begin to run on the novated capital amount from the date of judgment. The *in duplum* rule is concerned with the public interest and protects borrowers from exploitation by lenders who permit interest to accumulate, but does not provide protection to a debtor *pendente lite*.
- [35] In **Senekal v Trust Bank of Africa Limited**,³ the Court held that there was no question of the certificate of balance transferring the onus, in the full sense of the word, to the respondent/defendant but, in light of the provisions of the contractual terms between the parties, a respondent/defendant should at his/her own peril refrain from giving or leading evidence to counter the *prima*

² 1998 (1) SA 811 (SCA)
³ 1978 (3) SA 377 (AD)

facie proof of his/her indebtedness afforded by the certificate. The Court continued to hold that the trial Court's suspicion that the interest certified had been calculated at a rate in excess of the permissible rate was not, in itself, sufficient to justify non-suiting the respondent. The respondent/defendant had to, at least, proffer facts or adduce evidence of such a nature as to throw into judicial cognisable doubt the validity or legality of the claim.

- [36] There is no dispute that the certificate of balance does not form part of the applicant's cause of action. A certificate of balance bestows upon the creditor the evidential advantage of not having to prove the amount due by the debtor by means of the ordinary mode of proof, namely, the evidence of witnesses or supporting documents.⁴ As with the Trust Bank matter, the outstanding capital amount is undisputed in this case.

DECISION – THE IN DUPLUM RULE AND THE AMOUNT OWED

- [37] The Court is faced with the difficulty that the relief applied for by the applicant differs from that which was originally sought in the founding affidavit. During his reply and after I raised this with him, Mr Newton applied from the Bar for an amendment of the Notice of Motion to provide for judgment against the respondents jointly and severally and for payment of the compromised, unpaid capital sum, less the payments received, multiplied by two.
- [38] The calculation proposed by the applicant cannot be faulted as a matter of logic and law. The respondents do not dispute that they admitted their liability in terms of the Settlement Agreement. The payments made in terms of the Settlement Agreement are further not disputed. The respondents do not allege that they made further payments or that the applicant failed to account for all the payments. The applicant concedes that the respondents should be afforded the benefit of these payments and that interest can, therefore, only accrue to equal the amount of the unpaid capital sum.

- [39] I have no difficulty in granting an amendment of the Notice of Motion to provide for an order that the respondents be held liable jointly and severally since this was clearly specified in the founding affidavit and never disputed by the respondents. It accords with the terms of the agreements described previously.
- [40] Further, the applicant has proved the outstanding capital sum per the Settlement Agreement. Given the time that has lapsed between the date upon which the last payment was received in terms of the Settlement Agreement being 29 November 2021 to date hereof, the Court is left in the unenviable position that it cannot merely on the say-so of Counsel, during argument, accept that interest on the capital amount from 29 November 2021 to date of the order would be equal to the unpaid compromised capital in terms of the Settlement Agreement.
- [41] In motion proceedings, the affidavits constitute the evidence and the pleadings. It is trite that the parties must allege the required facts and adduce the admissible evidence in support thereof in their affidavits. In addition, the applicant must stand and fall by the facts alleged in its founding affidavit, although the court may exercise its discretion in exceptional circumstances to allow the applicant to supplement the allegations in the founding affidavit⁵.
- [42] These basic principles remain of importance. The Constitutional Court observed: *'Holding parties to pleadings is not pedantry, it is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded'*⁶.
- [43] The applicant is bound by its pleaded case, which it has, in part, succeeded in proving. The respondents admitted the settlement agreement and their indebtedness, although the admission was subject to the NCA defence that has now been rejected.

⁵ MEC for Education, GPv Governing Body, Rivonia Primary school 2013 (6) SA 582 (CC)

⁶ Public Servants Assoc abo Ubogu v Head, Dept of health, Gauteng 2018 (2) SA 365 (CC) at [50]

[44] I am not inclined to accede to the applicant's request to calculate the amount claimed by merely doubling the outstanding capital amount, assuming that the agreed interest would be double that amount over the period. This was for the applicant to prove. It is not for the Court to compute the judgment amount under these circumstances. The interest portion of the monetary claim is not liquated or easily ascertainable⁷. The applicant alleged only boldly in its founding affidavit that the respondents breached the terms of the Settlement Agreement. No particulars were provided of when the last payment was received or from what date interest accumulated. The date mentioned in the Certificate of Balance of 13 September 2023 is of no help, given that the certificate erroneously certified an amount above the unpaid capital and interest allowed by law. The amounts paid and the dates of such payments in terms of the Settlement Agreement were only mentioned in the replying affidavit after the respondents stated in their answering affidavit that they were under no obligation to have made any payments in terms of the Settlement Agreement. The applicant volunteered this evidence not as proof of the date of last payment but rather to demonstrate that the respondents made certain payments in terms of the Settlement Agreement, the validity of which they sought to deny. The fact remains, however, that this is the only evidence placed before the court of the last payment made by or on behalf of the respondents.

[45] The applicant conceded that the *duplum* had been passed and that the respondents' contention was correct based on the in-duplum rule. On the conspectus of all the affidavits, it means that based on both the applicant's and respondents' versions, the applicant is, at best for the applicant and, at worst for the respondents, entitled to judgment for the unpaid capital times two. The difficulty is that it does not appear from the affidavits how this should be computed. The respondents raised, with good reason, the *in duplum* defence in their answering affidavit, based on the amount claimed as per the notice of motion, the founding affidavit and the certificate of balance, all of

which we now know erroneously sought payment of a far greater amount than that which the applicant conceded is due to it.

[46] The agreements are silent on whether the applicant is entitled to simple, or compounded interest. In the absence of evidence to the contrary, the court must conclude that simple interest is payable⁸.

[47] The parties agreed that interest would be payable, and I will give effect to their agreement. Judgment will be granted for payment of the unpaid capital amount without interest. The interest will need to be calculated on the unpaid capital amount from the day following receipt of the last payment on 29 November 2021, as referred to in the applicant's replying affidavit.

COSTS

[48] The respondents agreed contractually to be liable for payment of the applicant's costs on the Scale as between attorney and client. Costs remain, however, a discretionary matter, and in light of the difficulties faced by the applicant concerning the certificate of balance, I cannot find that the respondents were not in part successful. I, therefore, exercise my discretion in awarding the applicant costs on the party and party scale, including counsel's fees on scale A in terms of Rule 69A.

[49] In the premises, the following order is granted:

1. The applicant's application for the amendment of the Notice of Motion succeeds in part as per the amended relief set out hereunder.
2. The respondents are jointly and severally liable to the applicant for payment of the unpaid capital amount of R944,919.85 in terms of the Settlement Agreement.

⁸ Coetzee and others v MEC for the Department of Health, Western Cape Province Government [2023] JOL 60541 (LC)

3. The respondents are jointly and severally liable to the applicant for payment of Interest on the unpaid capital amount of R944,919.85 at 3 percent per 30 days or part thereof calculated from 30 November 2021 (being the date after the last payment was received) up to and not exceeding the unpaid capital amount.
4. The respondents are liable for the applicant's party and party costs on Scale B.

VAN DEN BERG, AJ

For applicant: Adv A Newton
BPD Inc

For respondents: Adv L Wilkin
R Allom Attorneys